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Nos. 79-1429 and 79-1583

In the Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC., ET AL., PETITIONERS

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, ET AL.

NATIONAL COTTON COUNCIL OF AMERICA, PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM AND SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENT

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENT

Pursuant to Rules 35.5 and 35.6 of the Rules of this Court, the Solicitor General, on behalf of the Secretary of Labor, moves for leave to file the attached supplemental memorandum for the federal respondent.

These cases involve a challenge to the occupational health standard for exposure to airborne concentrations of cotton dust, issued by the Secretary of Labor on June 19, 1978, pursuant to Section 6(b) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 655(b). On March 27, 1981, subsequent to the oral argument in these cases, the Secretary sent to the Federal Register for publication an Advance Notice of Proposed Rulemaking, stating his intention to undertake additional administrative proceedings for the purpose of reassessing the requirements of the cotton dust standard. The attached supplemental memorandum is submitted to inform the Court of that intervening development and to discuss briefly its effect on the pending cases.

Respectfully submitted.

WADE H. MCCREE, JR.
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MARCH 1981

DOJ-1981-03

In the Supreme Court of the United States

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No. 79-1429

AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC., ET AL., PETITIONERS

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v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENT

We wish to bring to the Court's attention a recent development that bears on the appropriate disposition of these cases.

1. On June 19, 1978, the Secretary of Labor issued a final mandatory occupational health standard regulating occupational exposure to airborne concentrations of cotton

dust. 29 C.F.R. 1910.1043, 43 Fed. Reg. 27350-27399 (1978).[1] On pre-enforcement review of the cotton dust standard pursuant to 29 U.S.C. 655(f), the United States Court of Appeals for the District of Columbia Circuit upheld all major provisions of the standard with respect to petitioners. This Court thereafter granted certiorari to decide, among other issues, the role of cost-benefit analysis in setting toxic substances standards under the Occupational Safety and Health Act of 1970. After briefing by the parties, the Court heard oral argument on January 21, 1981.

2. On February 17, 1981, President Reagan issued Executive Order No. 12291, directing all federal agencies to assess potential costs and benefits of major regulatory proposals. See 11 Weekly Comp. of Pres. Doc. 124 (Feb. 23, 1981). In light of this directive, the Secretary has determined to undertake a re-examination of the cotton dust standard and has issued an Advance Notice of Proposed Rulemaking, which was filed with the Federal Register for publication on March 27, 1981. (A copy of the notice is attached as an Appendix, *infra*.) With the aid of administrative rulemaking, the Secretary intends to evaluate the feasibility and utility of cost-benefit analysis in the standard setting process, to compare the costs and benefits of the current standard and various alternatives, and to reassess the current standard in light of the findings.

The Secretary believes that, as indicated in Executive Order No. 12291, an analysis of the costs and benefits of federal regulation is of vital concern to the national welfare and should be taken into account by the government in setting its priorities. See 29 U.S.C. 655(g); Gov't Br. 56. Consonant with the policy underlying the Executive Order,

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[1]Amended at 43 Fed. Reg. 28473-28474, 35032-35035, and 56893-56894 (1978).

it is the Secretary's view that an assessment of the practicality of cost-benefit balancing is best achieved in the context of an actual standard such as the one concerning cotton dust and in a manner that permits public comments.[2]

In the Advance Notice of Proposed Rulemaking, the Secretary has stated that in order to provide for the best analysis, he will seek complete cost estimates for compliance with the current standard as well as for other proposed means of providing protection for employees exposed to cotton dust. The Secretary has also requested the most recent data available of the type necessary for traditional economic analysis, *e.g.*, the financial strength of the industry, and its capital needs and structure.

The Secretary believes that the information, data and comments likely to be received through a public proceeding will permit him to make an informed judgment as to the feasibility and utility of cost-benefit analysis in this area and, if feasible, to produce a comprehensive and thorough cost-benefit analysis of the cotton dust standard. This experience, plus the comparative experience under other health and safety laws (see 29 U.S.C. 655(b)(5)) will enable the Secretary to decide under what circumstances it is appropriate to factor such an analysis into the setting of standards for toxic substances. In particular, because the Secretary must base standards on the "best available evidence" (*ibid.*), the usefulness *vel non* of cost-benefit analysis bears on the legality of employing that analysis in the standard-setting process.

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[2]The Secretary produced one such analysis of this standard, at the request of Congress, after the standard was issued. *Cotton Dust: Review of Alternative Technical Standards and Control Technologies* (May 1979). However, this report and its assumptions, methodology and conclusions were not subject to public comment, and the report did not have the benefit of any recent data.

3. In view of the Secretary's determination to undertake comprehensive supplemental rulemaking to reconsider the cotton dust standard and the role of cost-benefit analysis under the Act, the Court may wish to refrain from further consideration of the issues now before it in the pending cases. The Secretary anticipates that, as a result of the rulemaking proceeding, extensive new information will come to light respecting such matters as the economic strength of the textile industry and the ability of that industry to implement the technology required by the standard. As a result, it is possible that some of the requirements of the standard will be modified. For example, recent reports of the improved economic health of the textile industry might provide a basis for an even more protective standard.

While the action the Secretary intends to take does not moot the present controversy, a decision by the Court at this time would, to a substantial degree, be tantamount to an advisory opinion. Cf. *EPA* v. *Brown*, 431 U.S. 99, 103-104 (1977). If, following the rulemaking proceeding, the Secretary determines that a new cotton dust standard should be promulgated, the possibility exists that no "person who may be adversely affected by [the] standard" will seek pre-enforcement review under Section 655(f) in the court of appeals or in this Court. Moreover, even if the new standard is challenged, the issues presented (such as economic feasibility) may be capable of resolution only by reference to the supplemental rulemaking record. Accordingly, the Secretary believes that it would be appropriate for the Court to vacate the judgment of the court of appeals and remand the case so that the record may be returned to the Secretary for further consideration and development. See *Cotton Warehouse Ass'n* v. *Marshall*, vacated and remanded, No. 79-1789 (Oct. 6, 1980); Rule 13(d), Gen. R. D. C. Cir.

During the pendency of the proposed administrative proceedings, it is the Secretary's intention that the present standard will remain in effect. Cotton dust has long been recognized as a major industrial health hazard, and the Secretary intends to continue to enforce the present standard in order to provide the necessary protection for the employees at risk. During the past year, employers have been obligated to put into place most of the standard's protective measures, with the exception of the requirement that engineering controls be installed. Completion of the latter obligation was deferred for four years. There was general agreement during the rulemaking proceeding on the necessity for such provisions as respirator usage, safer work practices and medical surveillance programs. It is therefore unlikely that a modified standard would fail to include such provisions, regardless of the Secretary's ultimate determination concerning the most appropriate permissible exposure level or the best means of achieving that level of protection.[3]

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[3]There is ample precedent for preserving the status quo in these circumstances. See, *e.g.*, *Western Oil & Gas Ass'n* v. *EPA*, 633 F. 2d 803, 813 (9th Cir. 1980), and the cases there cited. See also *Dayton Bd. of Education* v. *Brinkman*, 433 U.S. 406, 421 (1977). Here, of course, the validity of the cotton dust standard has been upheld by the court of appeals and, if the Court were to vacate and remand for the reasons suggested above, there would be no determination that the standard is in any way contrary to the statute. Hence, there are compelling equitable reasons for maintaining the standard in effect while the supplemental administrative proceedings are underway.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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APPENDIX

[4510-26]

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

[Docket No. H-052B]

Occupational Exposure to Cotton Dust

AGENCY: Occupational Safety and Health Administration (OSHA) Department of Labor

ACTION: Advance Notice of Proposed Rulemaking

SUMMARY: Notice is given that the Occupational Safety and Health Administration will shortly be undertaking, through rulemaking procedures under section 6 of the Occupational Safety and Health Act of 1970, a reevaluation and reconsideration of the occupational health standard regulating employee exposure to cotton dust, 29 CFR 1910.1043. The purpose of this proceeding is to review the economic consequences of the regulation and in particular to evaluate the feasibility and utility of relying on cost-benefit analysis in setting occupational health standards, in the context of a specific regulation. At this time, public participation is invited on the issues raised by such reevaluation and as to whether other matters relating to the hazards and regulation of cotton dust should be addressed.

DATES: Comments, suggestions and information are invited regarding this Advance Notice of Proposed Rulemaking. Comments in response to this Advance Notice should be submitted by May 15, 1981.

ADDRESSES: Comments should be submitted to the Docket Officer, Occupational Safety and Health Administration, Docket No. H-052B, Room S-6212, U.S. Department of Labor, 3rd and Constitution Avenue, N.W. Washington, D.C. 20210.

FOR FURTHER INFORMATION CONTACT: James Foster, Occupational Safety and Health Administration, Room N3637, U.S. Department of Labor, Washington, D.C. 20210, Telephone (202) 523-8151.

SUPPLEMENTARY INFORMATION:

1. *Introduction*

On June 19, 1978, the Occupational Safety and Health Administration (OSHA) issued a final occupational health standard regulating exposure to cotton dust, 29 CFR 1910.1043, at 43 FR 27350. The new standard superseded the previous Walsh-Healey standard which had been adopted by OSHA pursuant to section 6(a) of the Occupational Safety and Health Act. The necessity for a more stringent and comprehensive regulation was based on the substantial body of scientific and medical evidence showing a severe risk of debilitating respiratory disease, particularly among cotton textile workers. The standard provides for a comprehensive regulatory program including a permissible exposure limit for airborne concentrations of cotton dust to be met through engineering controls, supplementary use of respirators, implementation of specified work practices, a medical surveillance program, and a program for employee education and training. OSHA made findings that these elements of the standard were both technologically and economically feasible; the agency also rejected the use of cost-benefit criteria in setting the standard.

The standard was immediately challenged in the courts of appeals by affected employees and various groups of affected employers. On pre-enforcement review, the United

States Court of Appeals for the District of Columbia Circuit upheld the standard as it applied to the textile industry, among others. *AFL-CIO, et al.* v. *Marshall, et al.*, 617 F. 2d 636 (1979). The textile industry successfully petitioned for review in the Supreme Court of the United States, *American Textile Manufacturers Institute, Inc., et al.* v. *Donovan*, Nos. 79-1429 and 79-1583, in which the industry maintains that the standard is invalid because of the failure of the agency to justify it on a cost-benefit basis. The agency, adhering to its policy at the time the standard was issued, argued that such a justification could not be undertaken consistent with the Act and its purposes. This case is currently pending and no decision has been issued. Contemporaneous with this Advance Notice, the Secretary is filing with the Supreme Court a motion for leave to file a Supplemental Memorandum that brings to the attention of the Court the Secretary's decision to reopen the rulemaking record in the cotton dust proceeding.

2. *The Proposed Rulemaking*

While the agency in the past has maintained that it would be inconsistent with the Act for OSHA to engage in cost-benefit analysis for the purpose of setting standards for exposure to toxic substances, the agency has now concluded that it would be appropriate to re-examine its previous position. That the appropriateness of cost-benefit analysis in the application of regulatory policy is of vital concern to the national welfare and the national government is evidenced by the recent establishment of the Presidential Task Force on Regulatory Relief, chaired by the Vice-President, and the recently issued Executive Order No. 12291 which mandates such analysis in certain rulemakings. (46 FR 13193). The policy underlying that Order is that cost-benefit analysis is a useful device in the regulatory decision making process. Other safety and health agencies, although administering different statutes with somewhat different purposes, have found that the cost-benefit

technique or variants thereof are useful in their decision making processes. See *Consumer Products Safety Commission, Proposed Methodology for Commission Consideration of Findings Under Section 9(c) of the Consumer Products Safety Act*, 45 FR 85772 (Dec. 30, 1980); *Environmental Protection Agency, National Emission Standards for Hazardous Air Pollutants; Policy and Procedure for Identifying, Assessing, and Regulating Airborne Substances Posing a Risk of Cancer*, 44 FR 58642 (1979). In consonance with the policy of the Executive Order, it is the agency's view that it is appropriate to evaluate the practicality of cost-benefit balancing by investigating the concept in the context of an actual standard such as cotton dust and in a manner which permits public comment. The agency has already produced one such report on this standard, the report requested by Congress in 1979, *Cotton Dust: Review of Alternative Technical Standards and Control Technologies* (May 1979).* That report, its assumptions, its methodology and its conclusions, were not subject to any public comment; nor did the report have the benefit of any recent data. Evaluations of the usefulness and limitations of cost-benefit analysis are more likely to be understood and be more meaningful if they may be illustrated by reference to a particular set of facts such as the cotton dust record.

In order to provide the most complete and comprehensive analysis, the agency feels that it would be appropriate to utilize the most recent data. To this end, the agency intends to invite the submission of information providing the most complete cost estimates associated with compliance with the standard and any other proposed means of providing protection to exposed employees. OSHA expects

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*This report was produced at the direction of Congress after the issuance of the standard. Congress requested that the agency evaluate the standard on a cost-benefit basis, even though the agency had rejected this approach at the time it issued the standard.

that much useful information will be found in the development of the compliance plans required by 29 CFR 1910.1043(e)(3). Information will also be requested which is relevant to the types of economic analysis which OSHA has traditionally engaged in, such as the financial strength of the industry, its capital needs, its structure and so forth so that the interrelationships between this type of economic analysis and cost-benefit techniques may be evaluated. A thorough cost-benefit analysis will also explore all alternatives, including the use of respirators.

In the agency's view, all this information and data, as well as the public input which will be provided in the rulemaking proceedings, will permit the agency to produce a comprehensive and thorough cost-benefit analysis. This experience, plus the comparative experience under other health and safety laws (a comparison mandated by 29 U.S.C. 655(b)(5)), will enable the agency to decide under what circumstances it is appropriate and practical to factor such an analysis into setting toxic substances standards. Public comment will also be solicited on the issue of the extent to which cost-benefit analysis should be utilized in the setting of OSHA health standards. Based on the resolution of this important question, as well as any new information gathered in the process, the standard itself may be subject to adjustment.

In addition, at this stage of the proceeding OSHA will accept and consider suggestions as to the necessity for inquiring into other matters relevant to the enforcement of the standard. For example, this rulemaking would provide the opportunity, if necessary, to explore any problems with the vertical elutriator and Class III electrical hazards in textile mills, which was previously discussed in the Federal Register of October 10, 1980, 45 Fed. Reg. 67339-67340. Any other problems encountered under the monitoring provisions or in applying the concept of partial-shift use of

respirators discussed at 45 Fed. Reg. 85736-85739 (Dec. 30, 1980), may be pertinent topics for this proceeding.

Pending this reconsideration and reevaluation, it is the agency's judgment that the standard should remain in effect and continue to be enforced. Protection for employees at risk must be maintained as cotton dust has long been recognized as a major industrial health hazard. During the past year, employers have been obligated to bring most of the standard's protective measures into place with the exception of the requirement to install engineering controls, the completion of which was deferred for four years. There was general agreement during the rulemaking on the necessity of such provisions as respiratory usage, safer work practices, and a medical surveillance program, although the particulars may not have been resolved to the satisfaction of all affected employers. The long deferral of the next major step, engineering controls, means however that there is more than sufficient time for the agency to review the provisions of the standard as a whole and provide adequate notice if changes to the standard seem warranted. New effective dates may well be necessary in such a case. Consequently, there seems little justification for disrupting the compliance schedules and activities during this period of review. Any comments and suggestions should be sent to the Docket Office, at the address noted above, where they will be available for inspection and copying. Comments should be submitted by May 15, 1981.

3. *Authority*

This advance notice of proposed rulemaking was prepared under the direction of Thorne G. Auchter, Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Ave., N.W., Washington, D.C. 20210. It is issued pursuant to section 6(b) of the Occupational Safety and Health Act (84 Stat. 1593; 29 U.S.C. 655).

Signed at Washington, D.C. this 27th day of March 1981.

THORNE G. AUCHTER
Assistant Secretary of Labor